



## Brett Kavanaugh's Judicial Record on Guns

**What we know:** *Judge Kavanaugh's judicial record shows a dangerous outlier view of the Second Amendment, which is out of step with the broad consensus of court opinions upholding the constitutionality of the vast majority of common-sense gun safety laws since the Supreme Court's 2008 Heller decision.*

### How we know it:

- Judge Kavanaugh argues for an extreme outlier approach to Second Amendment analysis: judging from his record, he would disregard any and all public safety justifications for gun safety laws and instead consider only “text, history, and tradition.”
  - That would mean judges could only look at the meaning of the text of the Second Amendment and the history and tradition of gun regulations in a particular area when deciding whether a gun law is constitutional. He wrote in [Heller v. District of Columbia \(Heller II\)](#)<sup>1</sup> that under his interpretation of the Second Amendment, there is an “absence of a role for judicial interest balancing or assessment of costs and benefits of gun regulations.”
  - Judge Kavanaugh’s view has not been adopted by any court since the Supreme Court ruled in the first [District of Columbia v. Heller](#)<sup>2</sup> in 2008. Instead, a near-consensus has emerged among the federal courts of appeals around a two-step inquiry that considers not just “text, history, and tradition,” but also public safety justifications for gun safety laws.
  - Even Judge Kavanaugh’s colleagues on the D.C. Circuit disagree with his interpretation, writing that the Supreme Court in *Heller* “nowhere suggested, nor does it follow logically, that a regulation must be longstanding or ‘rooted in text, history, and tradition’ in order to be constitutional.”<sup>3</sup> They argued that Judge Kavanaugh “goes to great lengths to ‘divine’ his test that *Heller* clearly “did not announce.”<sup>4</sup>
  - The consensus among the courts—with which Judge Kavanaugh disagrees—is what has led the courts to reject nearly all legal challenges to gun safety laws since *Heller*—around 90%, according to [one recently published academic study](#).
- Judge Kavanaugh would have struck down D.C.’s prohibition on assault weapons as a violation of the Second Amendment.
  - In 2011, he issued a lone dissent in *Heller II*, voting to strike down the District of Columbia’s prohibition on assault weapons.<sup>5</sup> That put him at odds with his two other Republican-appointed colleagues on the D.C. Circuit Court of Appeals, who upheld this law as consistent with the Second Amendment.<sup>6</sup>
  - Judge Kavanaugh’s opinion on assault weapons prohibitions isn’t only a break with his D.C. Circuit colleagues—it is in direct opposition to every other appellate court that has considered this issue: including the [Second Circuit](#), [Fourth Circuit](#), and [Seventh Circuit](#) federal appeals courts, as well as the [Massachusetts Supreme Judicial Court](#), all of which upheld similar prohibitions on the sale of assault weapons.
  - In his dissent, Judge Kavanaugh echoed the gun lobby’s rhetoric by demonstrating his hostility to the term “assault weapon”—a statutory term that was expressly defined, but that he referred to only as “the rhetorical term ‘assault weapon.’”<sup>7</sup>



- Judge Kavanaugh also dissented in this same case from the court majority's decision upholding D.C.'s prohibition on large capacity magazines as consistent with the Second Amendment. (Judge Kavanaugh would have sent it back to the lower court for further consideration.)<sup>8</sup>
- Judge Kavanaugh dissented as to D.C.'s firearms registration requirements as well, writing that they "do not meaningfully serve the purpose of ensuring the owners know how to operate guns safely" and instead "are often seen as half-a-loaf measures aimed at deterring gun ownership."<sup>9</sup>

**What it means:** *Judge Kavanaugh's extreme outlier approach to the Second Amendment would put in jeopardy the full range of gun safety laws—including assault weapons and large-capacity magazine prohibitions, minimum age requirements, safe storage requirements and other common-sense gun safety laws.*

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<sup>1</sup> 670 F.3d 1244, 1285 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

<sup>2</sup> 554 U.S. 570 (2008).

<sup>3</sup> *Heller II*, 670 F.3d at 1267.

<sup>4</sup> *Id.*

<sup>5</sup> 670 F.3d at 1269, 1290-91 (Kavanaugh, J., dissenting).

<sup>6</sup> *Id.* at 1264, 1267-69 (majority opinion).

<sup>7</sup> *Id.* at 1290 (Kavanaugh, J., dissenting).

<sup>8</sup> *Id.* at 1296 n.20.

<sup>9</sup> *Id.* at 1291.